

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)	
1899 L Street, N.W.)	
12th Floor)	
Washington, D.C. 20036)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 12-1466
)	
NATIONAL OCEANIC AND)	
ATMOSPHERIC ADMINISTRATION)	
1401 Constitution Avenue, NW)	
Washington, DC 20230)	
)	
Defendant.)	

**COMPLAINT FOR DECLARATORY RELIEF AND
RELIEF IN THE FORM OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE for its complaint against
Defendant NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
("NOAA"), alleges as follows:

- 1) This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production under one request for certain described NOAA records, sent to or from a certain senior NOAA official over a four-month period in 2010.
- 2) In a FOIA request initiated on August 6, 2012, CEI sought described correspondence between NOAA's Thomas Peterson and a specific official of the United Nations Intergovernmental Panel on Climate Change ("IPCC").

- 3) NOAA did not respond to Plaintiff's request within twenty working days as required under FOIA by either by producing responsive records, or acknowledging the request, providing an identification number, and indicating an intention to begin processing or otherwise an intention to comply with the request.
- 4) Defendant has thereby constructively denied Plaintiff's request.
- 5) By Defendant's failure to respond, Plaintiff has no initial determination to administratively appeal, and has the right to seek judicial remedy. *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).
- 6) NOAA is an agency subject to the Freedom of Information Act, and is accountable to the taxpayers and to the public. It should not be free to disregard its FOIA obligations.
- 7) Transparency in government service is a legal requirement that has become the subject of great public interest and priority, and specific and high-profile promises from the president and attorney general of the United States. Meanwhile, the public continues to learn of widespread efforts by senior executive branch employees toward

not creating the required record their official activities, or otherwise hiding that record from disclosure, particularly Email.¹

PARTIES

- 8) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 9) Defendant NOAA is a federal agency, formally a bureau of the United States Department of Commerce headquartered in Washington, DC whose stated mission includes "provid[ing] citizens, planners, emergency managers and other decision makers with reliable information they need when they need it."

¹ See Eric Lichtblau, "Across From White House, Coffee With Lobbyists," *New York Times*, June 24, 2010, <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?pagewanted=all> (lobbyists "routinely get e-mail messages from White House staff members' personal accounts rather than from their official White House accounts, [the latter] which can become subject to public review"); and see Nick Bauman, "Starbucksgate: Obama's Lobbyist/Email Scandal," *Mother Jones*, June 28, 2010, <http://motherjones.com/mojo/2010/06/starbucksgate-crew-calls-investigation-white-house> (White House aides "using private email accounts to schedule coffee shop meetings with lobbyists (an apparent attempt to prevent these sessions from appearing in White House visitor logs)").

See also, Letter from Citizens for Responsibility and Ethics in Washington to Department of Energy Inspector General Gregory H. Friedman, August 28, 2012, <http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/8-28-12%20Letter%20to%20DOE%20IG%20Gregory%20Friedman%20on%20use%20of%20email.pdf?nocdn=1>; and see, Carol D. Leonnig and Joe Stephens, "Energy Dept. loan chief warned staff that personal e-mail could be subpoenaed", *Washington Post*, August 14, 2012, http://www.washingtonpost.com/politics/energy-department-loan-program-staffers-were-warned-not-to-use-personal-e-mail/2012/08/14/900621fa-e61f-11e1-8f62-58260e3940a0_story.html.

JURISDICTION AND VENUE

10) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

11) Venue is proper in this Court under 28 U.S.C. § 1391(b) because Plaintiff's and Defendant's principal place of business is in the District of Columbia.

FACTUAL BACKGROUND

12) This lawsuit seeks to compel NOAA to respond fully and completely to one FOIA request dated August 6, 2012 (Ex. 1). The request sought specifically described records sent to or from a senior NOAA employee named Thomas Peterson, from or to Intergovernmental Panel on Climate Change, Working Group I colleague, a WG1 Co-Chair named Thomas Stocker, over a four-month period in 2010.

13) Plaintiff made this request toward obtaining particular discussions among IPCC authors, and specifically a February 2010 letter sent by Email to IPCC authors and on IPCC letterhead providing recommendations about how IPCC authors might respond to widely reported Email leaks, including many Emails to and from NOAA employees, known as "Climategate".²

14) Mr. Peterson works as an IPCC author as a representative of the federal government of the United States, as part of his official duties with NOAA.

² This letter and other frustrated efforts to obtain it from governments under open records laws are discussed in detail at McIntyre, S., "Stocker's Secret Letter," ClimateAudit.org, August 3, 2012, <http://climateaudit.org/2012/08/03/ipccs-secret-letter/>.

- 15) After previous NOAA failures to disclose IPCC-related records, a Department of Commerce Inspector General affirmed that IPCC-related records are in fact “agency records” subject to FOIA.³
- 16) Defendant NOAA is required under FOIA to respond to requests within 20 working days.
- 17) NOAA’s response was due by September 4, 2012.
- 18) NOAA has failed to acknowledge or respond in any way to Plaintiff’s request.
- 19) Plaintiff is entitled to the requested information, and to judicial review of Defendant’s refusal to provide the information.

**Plaintiff's FOIA Request Seeking Certain
Correspondence Between Thomas Peterson and Thomas Stocker**

- 20) On August 6, 2012, Plaintiff sent a request for records by electronic mail to NOAA at

FOIA@noaa.gov, seeking:

all records, documents, internal and external communications and attachments produced, sent or received by NOAA’s Thomas Peterson, sent to or from Thomas Stocker, dated during the four-month period of February 2010 to May 2010, inclusive.

Defendant's Response to Plaintiff’s FOIA Request

- 21) NOAA has failed to acknowledged or respond in any way to Plaintiff’s request.

³ Department of Commerce Inspector General, “Examination of issues related to internet posting of emails from Climatic Research Unit,” alternately styled “Response to Sen. James Inhofe’s Request to OIG to Examine Issues Related to Internet Posting of Email Exchanges Taken from the Climatic Research Unit of the University of East Anglia, UK,” February 18, 2011, page numbers 15–16 (pdf pp. 18-19), available from <http://www.oig.doc.gov/Pages/Response-to-Sen.-James-Inhofe's-Request-to-OIG-to-Examine-Issues-Related-to-Internet-Posting-of-Email-Exchanges-Taken-from-.aspx>.

FIRST CLAIM FOR RELIEF

**Release of Certain Correspondence Between Thomas Peterson and Thomas Stocker
-- Declaratory Judgment**

- 22) Plaintiff re-alleges paragraphs 1-21 as if fully set out herein.
- 23) FOIA requires all doubts to be resolved in favor of disclosure. It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).
- 24) The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Ibid.*
- 25) Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an Exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n. 3; *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d at 515.

26) Federal statutes require that agencies, e.g., “foster greater sharing, dissemination, and access to public information,” and “promote public access to public information”. 44 U.S.C. § 3504. All disclosure obligations, including FOIA’s requirements, are to be accorded additional weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law, to which Plaintiff specifically cited in its request to EPA to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

27) The attorney general reaffirmed this with the *Memorandum for the Heads of Executive Departments and Agencies*, “The Freedom of Information Act,” March 19, 2009, and OIP Guidance, “President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Creating a ‘New Era of Open Government,’” <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>.

28) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

29) Plaintiff has a statutory right to the information it seeks.

30) By Defendant's actions Plaintiff has constructively exhausted its administrative remedies.

31) This Court should enter a judgment declaring that

- i. Documents reflecting IPCC-related correspondence between Thomas Peterson and Thomas Stocker (including attachments) are agency records under FOIA;
- ii. NOAA's denial of Plaintiff's FOIA Request seeking the described records is not reasonable, and does not satisfy NOAA's obligations under FOIA;
- iii. NOAA's refusal to produce the requested records is unlawful; and
- iv. NOAA must produce those requested records.

SECOND CLAIM FOR RELIEF

Release of Certain Correspondence Between Thomas Peterson and Thomas Stocker -- Injunctive Relief

32) Plaintiff re-alleges paragraphs 1-31 as if fully set out herein.

33) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's request described, *supra*.

34) This Court should enter an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) enjoining Defendant from further withholding responsive records and ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested correspondence between Thomas Peterson and Thomas Stocker (including attachments), or a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

THIRD CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

35) Plaintiff re-alleges paragraphs 1-34 as if fully set out herein.

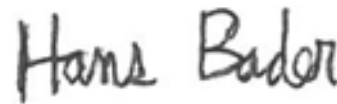
36) Pursuant to 5 U.S.C. § 552(a)(4)(E), the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

37) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

38) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 5th day of September, 2012,

A handwritten signature in dark ink that reads "Hans Bader". The signature is written in a cursive style with a vertical line at the end of the word "Bader".

Hans Bader
D.C. Bar No. 466545

A handwritten signature in dark ink that reads "Christopher C. Horner". The signature is written in a cursive style with a long horizontal stroke at the end.

Christopher C. Horner
D.C. Bar No. 440107

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September 5, 2012